

FILED ENTERED
LODGED RECEIVED
OCT 08 2002
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

The Honorable John C. Coughenour

FILED ENTERED
LODGED RECEIVED

OCT 18 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

DANE CHANCE, NANCY DONALDSON,
ARCHIBALD FILSHILL, MATT JAMPOLE,
JUDY PHAM, SCOTT WERBER, and
CHRISTOPHER BOWLES, individually and
on behalf of all others similarly situated,

Plaintiffs,

vs.

AVENUE A, INC.,

Defendant.

Case No. C00-1964 C

[Proposed] ORDER GRANTING
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT AND
APPROVING FORM AND MANNER OF
NOTICE

NOTE ON MOTION CALENDAR:
Tuesday, October 8, 2002

WHEREAS this Court has considered the parties' Settlement Agreement signed as of September 26, 2002 (the "Agreement") and papers submitted therewith, which together set forth the terms and conditions for a proposed settlement (the "Settlement") of this action and dismissal and release of all claims asserted herein and in two analogous cases against defendant Avenue A, Inc. ("Avenue A") titled *Garcia v. Avenue A, Inc.*, No. RCV058277 (Superior Court of California, County of San Bernardino) and *Lopez v. Avenue A, Inc.*, No.

PRELIMINARY APPROVAL ORDER

- 1 -

LAW OFFICES OF
CLIFFORD A. CANTOR, P.C.
627 208TH AVENUE SE
SAMMAMISH, WASHINGTON 98074-7033
Tel (425) 868-7813 • Fax (425) 868-7870

1 2001-02-752-G (District Court of Cameron County, 404th Judicial District, State of Texas)
2 (the three cases collectively are referred to herein as the "Litigation"); and

3 WHEREAS the Court has considered the parties' Joint Motion for Preliminary
4 Approval of Settlement and Approval of Form and Manner of Notice, the memorandum in
5 support thereof, and the papers submitted therewith (the "Joint Motion"), together with all
6 other relevant pleadings and papers on file herein, and finds and concludes that the Joint
7 Motion has merit;

8 NOW THEREFORE, IT IS HEREBY ORDERED:

9 1. The Settlement set forth in the Agreement is preliminarily approved, subject to
10 further consideration at the Settlement Hearing described below.

11 2. For purposes of this Settlement only, and pursuant to Federal Rule of Civil
12 Procedure 23(b)(3), the following class ("Settlement Class") is provisionally certified:

13 All Persons in the United States who, through and including the date of
14 this Order, have had any information about their computers or about them
15 gathered by Avenue A as a result of their Internet activity or who have
had one or more Avenue A Cookies placed upon any computer or
browser that they own or have utilized.

16 This provisional class certification shall automatically terminate and be void should the
17 Settlement not be finally approved for any reason, should final approval be reversed on appeal,
18 or should the Settlement otherwise fail to become effective. The certification shall not
19 constitute or be construed as an admission on the part of Avenue A that this action is
20 appropriate for class action treatment for litigation purposes.

3. The Court specifically finds that the requirements of Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure are satisfied with respect to the Settlement Class for the reasons given in the Joint Motion.

4. The representatives of the Settlement Class shall be the plaintiffs herein ("Class Representatives"). Counsel for the Settlement Class shall be plaintiffs' counsel herein. The following plaintiffs' counsel are appointed as plaintiffs' Co-Lead Settlement Counsel for all proceedings relating to the Settlement:

Bernstein Litowitz Berger & Grossmann LLP
Seth R. Lesser
1285 Avenue of the Americas
New York, New York 10019

Milberg Weiss Bershad Hynes & Lerach LLP
William J. Doyle II
600 West Broadway, Suite 1800
San Diego, California 92101

Law Offices of Clifford A. Cantor, P.C.
Clifford A. Cantor
627 208th Ave. SE
Sammamish, Washington 98074

Wolf Haldenstein Adler Freeman & Herz LLP
Adam J. Levitt
656 West Randolph Street, Suite 500W
Chicago, Illinois 60661

5. The Court has carefully reviewed the Settlement and finds that it provides substantial relief to the Settlement Class without the risk, cost, or delay associated with continued litigation, appeal, and/or trial. The Court preliminarily approves the Settlement as fair, adequate, and reasonable to the Settlement Class under the circumstances.

6. The Court will hold a hearing (the "Settlement Hearing") on March 6, 200~~2~~³ at 9 (a.m.)³p.m. [recommendation to Court: sixteen weeks after entry of this Order] in Courtroom ___ of the William Kenzo Nakamura United States Courthouse, 1010 Fifth Avenue, Seattle, Washington to determine whether the Court should

1 (a) approve the Settlement set forth in the Agreement as fair, reasonable, and adequate to the
2 Settlement Class; (b) enter a Final Order and Judgment approving the Settlement and
3 dismissing this action, as described in Section I(12) of the Agreement; and (c) approve the
4 amount of fees and expenses that should be paid to plaintiffs' counsel. The Court may
5 continue or adjourn the Settlement Hearing without further notice to the Settlement Class.

6 7. The Court hereby directs Avenue A to give notice to the Settlement Class of the
7 pendency of this action, the terms of the Agreement, the procedure for exercising the opt-out
8 right, and the procedure for filing written objections and appearing at the Settlement Hearing
9 as set forth in the Agreement. The Court approves, as to form and content, the Notice of
10 Pendency and Proposed Settlement of Class Action ("Notice") and the Summary Notice
11 attached to this Order as Exhibits 1 and 2. The Court finds that the distribution of the Notice
12 and the publishing of the Summary Notice in the manner set forth in Section VII of the
13 Agreement meet the requirements of Federal Rule of Civil Procedure 23 and due process, are
14 the best notice practicable under the circumstances, and shall constitute due and sufficient
15 notice to all persons entitled thereto. The Court approves the Notice and the Summary Notice
16 for dissemination. The notice specified in this paragraph shall be completed by
17 December 17, 2002, which is sixty (60) days after entry of this Order.

18 8. Any member of the Settlement Class may be excluded from the Settlement Class
19 if that person elects exclusion within the time set forth below. Members of the Settlement
20 Class who wish to be excluded from the Settlement Class must expressly state in writing:

(a) the name, address, and telephone number of the person requesting exclusion, (b) the name of this case, and (c) a statement that the person does not want to participate in the Settlement.

Such requests for exclusion must be mailed, postmarked no later than January 17, 200³~~7~~ [recommendation to Court: 30 days after deadline for giving notice], to the address provided in the Notice. All requests for exclusion must be signed by or on behalf of the person requesting exclusion.

9. Any member of the Settlement Class who does not, in connection with the Notice, file a valid, complete, and timely request for exclusion shall be considered part of the Settlement Class and be bound by the Final Order and Judgment and by the Agreement and its terms, if it is finally approved.

10. Any member of the Settlement Class may appear and show cause, if the member has any, why the proposed Settlement should or should not be approved as fair, adequate, and reasonable; why a judgment should or should not be entered thereon; or why attorneys' fees and expenses should or should not be awarded to plaintiffs' counsel. Objections by any Settlement Class member shall be heard and any papers submitted in support of said objections shall be considered by the Court at the Settlement Hearing only if, on or before January 17, 200³~~7~~ [recommendation to Court: 30 days after deadline for giving notice] such Settlement Class member files with the Court documents stating the basis for the objection and serves copies of the foregoing papers and all other papers in support of objection upon counsel for the parties, as directed in the Notice. If any member of the Settlement Class

1 who files an objection seeks to be heard orally at the hearing, the objector should so state in
2 the written objection.

3 11. On or before February 27, 200³~~2~~ [**recommendation to Court: one week**
4 **prior to the Settlement Hearing**], the parties shall file all papers in support of the Settlement
5 with the Court and shall serve copies of such papers upon each other. By the same date,
6 plaintiffs' Co-Lead Settlement Counsel shall likewise file and serve all papers in support of
7 the application for payment of attorneys' fees and reimbursement of expenses.

8 12. If not included in the papers referenced in the previous paragraph, on or before
9 February 27, 200³~~2~~ [**recommendation to Court: one week prior to Settlement**
10 **Hearing**], plaintiffs and defendant, jointly or separately, may, but are not required to, file
11 papers specifically addressing any or all objections. Any such filings addressing one or more
12 particular objections shall be served on the objector or the objector's counsel by fax or express
13 delivery.

14 13. Pending final determination of whether the proposed Settlement should be
15 approved, no Settlement Class member directly, derivatively, in a representative capacity, or in
16 any other capacity, shall commence, maintain or prosecute against Avenue A any action or
17 proceeding in any court or tribunal asserting any of the Released Claims, including unknown
18 claims.

19 14. Counsel are hereby authorized to utilize all reasonable procedures in connection
20 with approval and administration of the Settlement that are not materially inconsistent with
21

1 this Order or the Agreement including, without further approval of the Court, making minor
2 changes to the content of the Notice that they jointly deem reasonable or necessary.

3 15. If the proposed Settlement is not finally approved, or otherwise is terminated in
4 accordance with the terms of the Agreement, the Agreement shall have no force or effect.
5 Furthermore, in such an event, all negotiations, proceedings, and statements made in
6 connection with the Settlement and the settlement approval process shall be deemed
7 inadmissible in any further proceedings, and the parties to this litigation shall be restored to
8 their respective positions prior to the entry of this Order.

9 16. The following is a summary of the schedule for settlement proceedings:

Event	Recommended Timing	Date
Deadline for completion of notice (<i>supra</i> ¶ 6)	60 days after date of this Order	<u>December 17</u> , 2002
Deadline for requesting exclusion (<i>supra</i> ¶ 11)	30 days after deadline for completion of notice	<u>January 17</u> , 2002 ³
Deadline for filing objections (<i>supra</i> ¶ 13)	30 days after deadline for completion of notice	<u>January 17</u> , 2002 ³
Submit papers in support of Settlement (<i>supra</i> ¶ 14)	1 week prior to Settlement Hearing	<u>February 27</u> , 2002 ³
File responses to objections (<i>supra</i> ¶ 15)	1 week prior to Settlement Hearing	<u>February 27</u> , 2002 ³
Settlement Hearing	At Court's convenience, approximately 16 weeks after date of this Order	<u>March 6</u> , 2002 ³ at 9:00 (a.m./p.m.)

18 DATED: 10/17, 2002.

19 
20 THE HONORABLE JOHN C. COUGHENOUR
21 UNITED STATES DISTRICT JUDGE

1 Presented by:

2 *Attorneys for Plaintiffs:*

3 LAW OFFICES OF CLIFFORD A. CANTOR, P.C.

4
5 By: Cliff Cantor
6 Clifford A. Cantor, WSBA #17893

7 627 208th Ave. SE
8 Sammamish, WA 98074-7033
9 Tel: (425) 868-7813
10 Fax: (425) 868-7870

11 Seth R. Lesser
12 Andrew M. Gschwind
13 BERNSTEIN LITOWITZ BERGER
14 & GROSSMANN LLP
15 1285 Avenue of the Americas, 33rd Floor
16 New York, NY 10019
17 Tel: (212) 554-1400
18 Fax: (212) 554-1444

19 Dennis Stewart
20 William J. Doyle II
21 MILBERG WEISS BERSHAD HYNES
& LERACH LLP
401 B Street, Suite 1700
San Diego, CA 92101
Tel: (619) 231-1058
Fax: (619) 231-7423

Lori G. Feldman (WSBA # 29096)
MILBERG WEISS BERSHAD HYNES
& LERACH LLP
1001 Fourth Ave., Suite 2550
Seattle, WA 98154
Tel: (206) 839-0730
Fax: (206) 839-0728

Attorneys for Defendant:

PERKINS COIE L.L.P.

By: David J. Burman
David J. Burman, WSBA #10611
Elizabeth A. Alaniz, WSBA #21096
Nicholas P. Gellert, WSBA #18041
1201 Third Ave., Suite 4800
Seattle, WA 98101-3099
Tel: (206) 583-8888
Fax: (206) 583-8500

1 Adam J. Levitt
WOLF HALDENSTEIN ADLER
2 FREEMAN & HERZ LLC
656 West Randolph Street, Suite 500W
3 Chicago, IL 60661
Tel: (312) 466-9200
4 Fax: (312) 466-9292

5 Daniel W. Krasner
David A.P. Brower
6 WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
7 270 Madison Ave., Suite 900
New York, NY 10016
8 Tel: (212) 545-4600
Fax: (212) 686-0114

9 Steven E. Cauley
10 CAULEY & GELLER LLP
11311 Arcade Dr., Suite 201
11 Little Rock, AS 72212
Tel: (501) 312-8500
12 Fax: (501) 312-8505

13 Brian J. Robbins
ROBBINS UMEDA & FINK, LLP
14 1010 Second Ave., Suite 2360
San Diego, CA 92101
15 San Diego, CA 92101
Tel: (619) 525-3990
16 Fax: (619) 525-3991

17 Bryan L. Clobes
MILLER FAUCHER AND CAFFERTY LLP
18 30 South 15th Street, Suite 2500
Philadelphia, PA 19102
19 Tel: (215) 864-2800
Fax: (215) 864-2810

20 Marvin A. Miller
21

PRELIMINARY APPROVAL ORDER

- 9 -

LAW OFFICES OF
CLIFFORD A. CANTOR, P.C.
627 208TH AVENUE SE
SAMMAMISH, WASHINGTON 98074-7033
Tel (425) 868-7813 • Fax (425) 868-7870

1 Lori A. Fanning
2 MILLER FAUCHER AND CAFFERTY LLP
3 30 North LaSalle Street, Suite 3200
4 Chicago, IL 60602
5 Tel: (312) 782-4880
6 Fax: (312) 782-4485

7 Daniel Harris
8 LAW OFFICES OF DANIEL HARRIS
9 150 North Wacker Drive, Suite 3000
10 Chicago, IL 60606
11 Tel: (312) 960-1802
12 Fax: (312) 960-1936

13 Shannon P. Keniry
14 FINKELSTEIN, THOMPSON & LOUGHRAN
15 1055 Thomas Jefferson St. NW, Suite 601
16 Washington, DC 20007
17 Tel: (202) 337-8000
18 Fax: (202) 337-8090

19 Louis Gottlieb
20 GOODKIND LABATON RUDOFF
21 & SUCHAROW LLP
100 Park Avenue
New York, NY 10017
Tel: (212) 907-0700
Fax: (212) 818-0477